HOUSE OF LORDS SESSION 2004–05
[2004] UKHL 53

on appeal from: [2002] EWCA Civ 1870

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Beynon and Partners (Respondents)
v.
Her Majesty's Commissioners of Customs & Excise (Appellants)

ON
THURSDAY 25 NOVEMBER 2004

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Scott of Foscote
Lord Walker of Gestingthorpe

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, with which I agree, I would allow this appeal.

LORD STEYN

My Lords,

2. I have had the advantage of reading the opinion of my noble and learned friend Lord Hoffmann. I agree with it. I would also allow the appeal and restore the decision of the tribunal and Collins J.

LORD HOFFMANN

My Lords,

3. The issue in this appeal is whether the personal administration of a drug such as **a** vaccine by a NHS doctor to a patient is a taxable supply for the purposes of value added tax. The European Sixth Directive (77/388/EEC) requires that the provision of medical care in the exercise

of the medical and paramedical professions should be exempt from VAT: see article 13 A 1(c). On the other hand, the supply of goods (defined in article 5.1 as "the transfer of the right to dispose of tangible property as owner") is taxable. The question is therefore whether the doctor is making a single supply of medical services to which the provision of the drug is merely ancillary or whether he is also supplying goods when, for example, the injected drug passes through the needle into the patient's arm.

4. The Commissioners of Customs and Excise take the view that there is a single exempt supply. The consequence is that the doctor is not entitled to deduct or seek repayment of the input tax which was paid on the supply of the drugs to him. That is the normal position of a supplier of exempt services. He is treated as if he was a consumer and bears the burden of the whole of the VAT which has been paid when he receives supplies of goods or services for the purposes of his business or profession. His expenses on VAT, like his other expenses, are matters which he must take into account when deciding what to charge his customers.

5. A doctor in the NHS cannot of course include an allowance for VAT in what he charges his patients because he cannot charge at all. Instead, he must recover his expenses, one way or another, from the NHS. The great majority of doctors do not register for VAT at all. The services they provide are not taxable and the VAT charged on their purchases is not recoverable. In the case of drugs which a doctor buys for use in his practice, the NHS refunds him an amount calculated according to a formula which includes an allowance for VAT: see paragraph 44.2 of the Statement of Fees and Allowances ("the Red Book") made pursuant to Regulation 34 of the National Health Service (General Medical Services) Regulations 1992 (SI 1992/635) ("the General Regulations").

6. There is however a small minority of doctors who do register for VAT because they are, exceptionally, permitted to dispense drugs as well as administer them. This requires some explanation. In principle, doctors prescribe drugs and registered pharmacists dispense them. By section 43 of the National Health Service Act 1977, the NHS is ordinarily prohibited from making arrangements for doctors to supply "pharmaceutical services", which are defined by section 41 as:

> "drugs and medicines and listed appliances which are ordered for [the patient] by a medical practitioner in pursuance of his functions in the health service…"

7. This rule is however subject to an exception. The NHS has a duty under section 41 of the 1977 Act to arrange, in accordance with regulations, for the supply to persons in their area of "proper and sufficient" pharmaceutical services. Normally this duty is satisfied by arrangements with pharmacists. But there are some rural areas which do not have pharmacies within easy reach of all residents. The Area Health Authority must therefore make arrangements for doctors to provide such residents with pharmaceutical services.

8. Such arrangements are made under regulation 20 of the National Health Service (Pharmaceutical Services) Regulations 1992 (SI 1992/662) ("the Pharmaceutical Regulations"). This provides that if a patient would have "serious difficulty in obtaining any necessary drugs or appliances from a pharmacy by reason of distance or inadequacy of means of communication" and in certain other circumstances, he may ask that his doctor provide him with pharmaceutical services and the FHSA may make arrangements for the doctor to do so. In such a case, the doctor acts as if he was a pharmacist. He orders the drug by prescription and then he, or someone in his practice, dispenses the drug to the patient.

9. When drugs are dispensed on prescription in the ordinary way by a registered pharmacist, they are zero-rated for VAT: section 30(2) and Group 12, item 1 in Schedule 8 to the Value Added Tax Act 1994. And by item 1A(a), inserted into the Schedule by the VAT (Supply of Pharmaceutical Goods) order (SI 1995/652), the same treatment is accorded to drugs supplied "in accordance with a requirement or authorisation under regulation 20".

10. That means that if the doctor registers for VAT, he will be able to obtain a refund of the input tax paid on the drugs or appliances supplied to him for dispensing to patients under regulation 20. If a doctor does a sufficient turnover in these goods, it becomes worth his while to register and claim back the input tax. The Statement of Fees and Allowances says, in paragraph 44.4, that practices normally register when they dispense enough drugs under regulation 20 to have to employ a registered pharmacist to do the dispensing. We were told that in

England, about 180 medical practices (out of about 4000) are registered for VAT.

11. Where a doctor is registered for VAT, the NHS does not make any allowance for input VAT when it pays him for the drugs which he has dispensed under regulation 20. That is logical, because he is entitled to claim repayment from the Commissioners of Customs and Excise. But the problem which has given rise to these proceedings is that the Department of Health takes the same view about the VAT on drugs which the doctor administers personally. He receives no allowance for VAT because the Department assumes that he will be able to recover it from Customs and Excise. But the Commissioners, as I have said, take a different view. They accept that when a doctor dispenses drugs under regulation 20, he supplies goods exactly as if he were a pharmacist. But they say that when he administers a drug personally, he is not supplying goods. He is supplying an exempt service.

12. The doctors registered for VAT have thus become involved in what appears to be an inter-departmental dispute. But the result is that neither the NHS nor the Commissioners are prepared to refund or make an allowance for VAT paid on personally administered drugs by practices registered for VAT. These proceedings were commenced by way of an appeal from a ruling of the Commissioners to the Manchester VAT Tribunal (JD Demack, Chairman, the Hon Mrs Angela Widdows, JTB Strangward) by a VAT registered medical practice in Beverley. The Tribunal dismissed the appeal. An appeal to the judge (Lawrence Collins J) was unsuccessful [2002] EWHC 518 Ch but the doctors succeeded in the Court of Appeal (Aldous and Chadwick LJJ and Munby J) [2002] EWCA Civ 1870. The Court of Appeal held that injections and so forth were separate supplies of the goods injected and that they were zero-rated. The Commissioners appeal to your Lordships' House.

13. The logical order in which to consider the issues is first to decide whether, in the case of personal administration, there is any supply of goods and then, if there is, to decide whether it is zero-rated or standard-rated. But I propose to reverse this order and consider whether, assuming there to be a supply of goods, it would be zero-rated. I do so because I think that the answer throws some light on the first question. The Tribunal and Lawrence Collins J thought that such a supply of goods would not be zero-rated. To fall within item 1A(a) of Group 12 the drug must be supplied "in accordance with a requirement or authorisation under regulation 20". Like the tribunal and the judge, I

find it impossible to see how the personal administration of a drug by a doctor to a patient who happens to be entitled to a supply of drugs under regulation 20 can be described as a supply "in accordance with a requirement or authorisation under regulation 20." The doctor has no need of any authorisation under regulation 20 to give a patient an injection. It is done all the time by doctors who have no authorisation to make any regulation 20 supplies. The doctor would probably have sufficient authority to do simply by virtue of paragraph 12 of the Terms of Service for Doctors in Schedule 2 to the General Regulations:

> "a doctor shall render to his patients all necessary and appropriate personal medical services of the type usually provided by general medical practitioners."

14. If, however, this was not enough, regulation 19(b) of the Pharmaceutical Regulations provides that any doctor may:

> "provide to a patient any appliance or drug, not being a Scheduled drug, which he personally administers or applies to that patient."

15. Thus the Pharmaceutical Regulations make a clear distinction between the administration of a drug to the patient by the doctor himself and the dispensing to the patient of drugs which the doctor has ordered for him. The former is something which any doctor may do - indeed, must do, if that would be an appropriate personal medical service which it is the doctor's duty to provide under paragraph 12 of his terms of service. The latter is normally the function of a pharmacist. A doctor can do it only if the patient is the subject of arrangements under regulation 20.

16. In the Court of Appeal, Aldous LJ, having held that there was a separate supply of goods, went on to say (at paragraph 47) that it was zero-rated. Chadwick LJ did not deal expressly with the point but he and Munby J agreed with Aldous LJ. But Aldous LJ gave no reasons for his decision on this point and made no comment on the reasoning of the tribunal and the judge which had led them to the opposite conclusion. In my opinion this was an error. If personally administered drugs are a supply of goods, they must be standard-rated.

17. This conclusion has, as I indicated earlier, some relevance to the main question in the appeal. If Parliament had thought that the personal administration of drugs by doctors was a separate supply of goods, it would be very strange that it was not also zero-rated. So the restricted scope of item 1A(a) suggests that Parliament never contemplated that personal administration involved any supply of goods at all.

18. However, whatever Parliament may have thought, the question of whether there is one supply or two involves the application of principles of European law in compliance with the Sixth Directive. In *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] 2 AC 601, 626, para 26 the European Court of Justice gave authoritative guidance on the test for deciding:

> "whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately."

19. In the course of argument your Lordships were also referred, as were the courts below, to a number of cases, both in this country and in the Court of Justice, which were decided before the *Card Protection* case. Submissions were made as to whether the principles upon which those cases were decided had application to this case. Their Lordships think that there is no advantage in referring to such earlier cases and their citation in future should be discouraged. The *Card Protection* case was a restatement of principle and it should not be necessary to go back any further.

20. The Court of Justice observed, in paras 27-29, that the diversity of commercial operations made it impossible to give exhaustive guidance as to how to approach the problem correctly in all cases. Regard should always be had to the circumstances in which the transaction took place. Every supply of "a service" is by definition distinct and independent but a supply which "from an economic point of view" comprises a *single* service should not be artificially split into separate "services". What matters is "the essential features of the transaction". The court went on to say, in para 30:

> "There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be

> regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied: *Customs and Excise Commissioners v Madgett and Baldwin (trading as Howden Court Hotel*) (Joined Cases C-308/96 and 94/97) [1998] STC 1189, 1206, para 24."

21. As an example of the need to examine the circumstances in which the transaction takes place, the court referred to its earlier decision in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] ECR I-2395, 2411-2412, which concerns the classification of restaurant meals. The court laid down the following general principles:

> "13 The supply of prepared food and drink for immediate consumption is the outcome of a series of services ranging from the cooking of the food to its physical service in a recipient, whilst at the same time an infrastructure is placed at the customer's disposal, including a dining room with appurtenances (cloak rooms, etc.), furniture and crockery. People, whose occupation consists in carrying out restaurant transactions, will have to perform such tasks as laying the table, advising the customer and explaining the food and drink on the menu to him, serving at table and clearing the table after the food has been eaten.
>
> 14 Consequently, restaurant transactions are characterized by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services within the meaning of article 6(1) of the Sixth Directive. The situation is different, however, where the transaction relates to 'take-away' food and is not coupled with services designed to enhance consumption on the spot in an appropriate setting."

22. In the present case, the tribunal made the following findings about the circumstances in which drugs are administered by doctors to their patients:

> "26. Generally, patients self-administer medicines…But the administration, and application and fitting, of

some medications, dressings and appliances requires the employment of the medical expertise of a doctor or nurse. Injections, such as vaccines, are the most common example of this, but there are others such as the fitting of certain contraceptive devices. In those cases, the GP is expected to provide in-house stock to administer to his patient…

27. In those circumstances, the NHS considers the supply of drugs, dressings or appliances to be part of the provision of treatment whereby the doctor's skills and knowledge [are] applied in rendering all necessary and appropriate personal medical services of the type usually provided by general medical practitioners, as required by paragraph 12(1) of Schedule 2 to the [National Health Service (General Medical Services) Regulations 1992 (SI 1992/635)]

28. The importance and appropriateness of the supply of drugs and appliances administered by a GP varies with the medical condition of, and other circumstances particular to, the patient. Immunisations provide a good example…As all vaccines require storage at controlled temperatures…it militates against patients obtaining vaccines by prescription and dispensary, and then taking them to a surgery for administration. It requires professional expertise to decide whether a patient is in a group which will benefit from immunisation. Questions to be considered include…Are there any relevant contra-indications?...Does the immunisation need to be postponed?

29. The doctor then needs to decide which vaccine to use (eg oral or by injection), its strength, the number of doses required and at what intervals, whether it should be given intradermally, subcutaneously or intramuscularly, with what length of needle it must be injected and in what part of the body…

Where a patient has a cut or other skin wound, parallel considerations are also needed. The GP must decide whether the injury is one requiring skin

> closure, whether closure is required without delay, what type of skin closure should be used, and whether it is appropriate for the GP to carry out the closure procedure himself. If so, he must choose an appropriate product or products (eg the type of suture material and needle)."

23. Apart from home visits, which are nowadays relatively infrequent, drugs will be personally administered by the doctor in his surgery. This provides a convenient setting where stocks of drugs are maintained, facilities and equipment are accessible, the patient's records are kept and the assistance of colleagues and nurses is available.

24. Applying the guidance provided by the Court of Justice in the *Card Protection* case, the tribunal came to the conclusion, in para 74, that the personal administration of drugs to the patient by a doctor was merely ancillary to his supply of exempt medical services:

> "…there is a single supply from an economic point of view: the commercial reality is that the appellants in personally administering or applying drugs and appliances to their…patients provide a single package of medical services of the type usually provided by GPs…
>
> …it is artificial to regard supplies of drugs and appliances personally administered or applied…as independent and distinct supplies: they are supplied as part of a single package of medical services…
>
> …the essential feature of the supply of a drug or appliance personally administered to a…patient is that of medical services appropriate and proportionate to the condition of the patient at the time of administration: the supply is not an aim in itself, having no free standing utility to the patient, but merely a means of his obtaining the benefit of medical services provided by the appellants
>
> …as no prescription charge is made for drugs and appliances personally administered or applied to any patient…(a fact which we find indicative of the NHS expecting the drug or appliance to be supplied by the doctor from in-house stock), there is no separate price that

might point to the supply being separate from that of medical services."

25. There was some discussion in the judgments of Lawrence Collins J and the Court of Appeal as to whether the application of the principles laid down by the Court of Justice involved a question of law or a question of fact. The appeal from a VAT Tribunal to the judge is only on a question of law and the judge thought that the decision was one of fact, or at any rate "appreciation of the facts" (para 73). He went on to say that in any case he agreed with the tribunal's conclusion, substantially for the reasons it had given.

26. In the Court of Appeal, Aldous LJ said that the classification of the transaction as a supply of services or of goods and services was a question of law. He cited in support the decision of this House in *Customs and Excise Commissioners v British Telecommunications Plc* [1999] 1 WLR 1376, 1381 in which Lord Slynn of Hadley said that the "characterisation of the supply as provided for here in the contractual documents is a matter of law". Aldous LJ pointed out that the facts found by the tribunal were not in dispute. The issue was as to their legal consequences.

27. In my opinion the weight of authority supports the view of the Court of Appeal on this point. The courts have not treated VAT classification in the same way as some questions of classification (for example, whether a contract is of service or for services) which, notwithstanding that there are no facts in dispute, are deemed to be questions of fact so as to exclude on appeal on a question of law: see the discussion in *Moyna v Secretary of State for Works and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, 1935, paras 22-25. On the other hand, as Lord Hope of Craighead said in the *British Telecommunications Plc* case, at p 1386, the question is one of fact and degree, taking account of all the circumstances. In such cases it is customary for an appellate court to show some circumspection before interfering with the decision of the tribunal merely because it would have put the case on the other side of the line.

28. Aldous LJ was impressed by the fact that when a doctor administered a drug to any patient, whether he was a regulation 20 patient or not, he made out a prescription for that drug. The tribunal and the judge had thought that prescriptions were made out only for regulation 20 patients, but the parties agreed that in order to obtain

payment from the NHS, the doctor had to make out a prescription for all personally administered drugs. Aldous LJ thought that this was a serious error which vitiated the tribunal's decision, because in his opinion it led to the conclusion that there was really no difference between dispensing drugs under regulation 20 and administering them personally. In both cases a prescription is prepared and the drug is "dispensed" either to the patient under regulation 20 or to the doctor for administration to the patient.

29. In my opinion this exaggerates the significance of writing prescriptions for personally administered drugs. The sole purpose is to enable the doctor to vouch his claim for payment by the NHS. It is true that this shows that, at least from the point of view of the NHS, there is a separate payment for the drugs. But, as Lord Hope of Craighead said in the *British Telecommunications Plc* case, at p1385, the fact that a price for the supply in question can be separately identified is not determinative. The fundamental distinction made by the Pharmaceutical Regulations between the administration and dispensing of drugs remains. The doctor does the first as part of the ordinary services which he provides. He can do the second only with special authorisation under regulation 20.

30. Aldous LJ acknowledged, at para 37, that "at a particular level of generality" it could be said that there was one transaction. But he said, at para 49, that when a doctor administered a drug to a patient he was "in reality dispensing the drug to the patient and then administering it". Chadwick LJ likewise divided the transaction into three elements: first, the consultation and diagnosis, secondly the supply of the drug for the purposes of treatment and thirdly its administration. The first stage, he said, was "dissociable" from the second and third and constituted a separate supply. Although there might be some medical skill involved at the third stage, the dominant element was the supply of the drug and it was therefore to be classified as a supply of goods.

31. Besides raising the question of what authority a doctor would have to dispense drugs to patients who were not regulation 20 patients, this approach seems to me to involve the kind of artificial dissection of the transaction which the Court of Justice warned against in para 29 of its judgment in the *Card Protection* case [1999] 2 AC 601. In my opinion the level of generality which corresponds with social and economic reality is to regard the transaction as the patient's visit to the doctor for treatment and not to split it into smaller units. If one takes this view, then in my opinion the correct classification is that which the NHS

has always taken of the personal administration of drugs to non-regulation 20 patients, namely that there is a single supply of services.

32. It is true that in some cases, the nature of the drug which is administered will assume a greater importance than in other cases. It is easy to think of examples in which the element of skill on the part of the doctor is at a minimum and what matters is that the patient should receive, for example, a particular injection for travel to a foreign country. But in applying the classifications required by VAT, it is essential for practical reasons to have a rule which applies to all transactions of a certain kind. For example, in the case of the restaurant meals for which the Court of Justice laid down a general rule in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] ECR I-2395, one could imagine cases in which the services provided by the restaurant were insignificant compared with the value of the food or wine. It would however be administratively impossible to deal with each meal on a case by case basis. It is essential to have a rule which applies across the board.

33. I would therefore allow the appeal and restore the decision of the tribunal and Lawrence Collins J. This means that practices such as the respondents which are registered for VAT will not be able to recover input tax from the Commissioners on personally administered drugs. If the Department of Health continue to apply their current practice, they will not obtain an allowance from the NHS either. The Department is not a party to these proceedings and your Lordships' decision is not binding upon them. But as the practice is based upon the assumption that the doctors will be able to recover input tax from the Commissioners and, if your Lordships agree with my opinion, that assumption will be shown to be wrong, it may be hoped that the Department will reconsider the matter. It does not appear to me that there is anything in the Statement of Fees and Allowances which would prevent it from doing so. Paragraph 44.4 provides:

> "Unless a dispensing practitioner is registered with HM Customs and Excise for VAT purposes…a VAT allowance shall be paid to cover the VAT payable on his or her purchase of drugs and appliances and containers."

34. This paragraph applies only to "dispensing practitioners", that is to say, those authorised to dispense drugs under regulation 20, and in my opinion it was intended only to apply to VAT charged on drugs etc

purchased for the purposes of being so dispensed. For the reasons given earlier in this opinion, that would be perfectly logical. What would be illogical would be to extend it to VAT on drugs purchased by the same practitioners for personal administration, where no recovery of VAT from the Commissioners is possible. An allowance for the VAT on such purchases should be recoverable under paragraph 44.2.v, whether the practitioner is registered for VAT or not.

LORD SCOTT OF FOSCOTE

My Lords,

35. I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Hoffmann. I agree with it and for the reasons Lord Hoffmann has given. I, too, would allow this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

36. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it and for the reasons given by Lord Hoffmann I too would allow the appeal.